



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/544,349	04/06/2000	William C. Bornhorst	5282USA	8014

7590

01/17/2002

John A O'Toole Esq
P O Box 1113
Minneapolis, MN 55440

EXAMINER

CORBIN, ARTHUR L

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 01/17/2002

5

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No. 09/544,349	Applicant(s) BORNHART ET AL
Examiner ARTHUR L. CORBIN	Group Art Unit 1761

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- ☒ Responsive to communication(s) filed on 5-2-01
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 1-41 is/are pending in the application.
- Of the above claim(s) _____ is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 1-41 is/are rejected.
- ☒ Claim(s) 1-3, 6, 12, 15, 17-19, 26, 28-30, 33-35, 38, 39 is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some* ☐ None of the:
- ☐ Certified copies of the priority documents have been received.
- ☐ Certified copies of the priority documents have been received in Application No. _____
- ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____

Attachment(s)

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No(s). 4
- ☒ Notice of Reference(s) Cited, PTO-892
- ☒ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Interview Summary, PTO-413
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Other _____

Office Action Summary

Claims 1-3, 6, 12, 15, 17-19, 26, 28-30, 33-35, 38 and 39 are objected to because of the following informalities:

In claim 1, line 8, "an" should be added after "provide" and line 13, "and" should be added after the semicolon. In claim 2, line 3; claim 6, line 1 and claim 26, line 1, "in" should be cancelled. In claim 3, "steps" should be "step". In claim 12, line 1, "comprising" should be added after "extruding". In claim 15, line 2, "while cooling" is redundant and should be cancelled and "time" should be added before "cooked". Also, "time" should be added before cooked in claim 17, line 3; claim 18, lines 3 and 4; claim 19, line 3; claim 38, lines 3 and 5 and claim 39, line 1. In claim 19, line 1, "the" should be added after "forming". In claims 28-30, "rapidly" should be changed to "rapid". In claims 33-35, "pumping" is misspelled.

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 1, 7, 11, 13, 16, 18, 20, 22, 24, 25, 27-30 and 33-36 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 is indefinite in not reciting "in a first cooking step" after "extruder" (line 7) since a second cooking step is recited in claim 1, part C. Claim 1 is also indefinite in not reciting "from said free cereal grain pieces" after "bits" (line 9) and "said" after "having" (claim 1, line 18). There is no antecedent basis: in claim 2 for "the rapid

Art Unit: 1700

heating" (claim 7); in claim 1 for "the agitation during steeping" (claim 11); in claim 12 for "the first cooking step of step B" and "the first cooking step" (claim 13); in claim 19 for "the ribbon of two plys" (claim 20); in claim 14 for "the finished snack" (claim 22), which should be changed to "the snack product"; in claim 21 for "the pellet forming step" (claim 24); in claim 1 for "the finished puffed snack products" (claim 25); in claim 26_ for "the dough extrusion step" (claim 27); in claim 13 for "the rapidly heating" (claims 28-30); in claim 32 for "step C of slow cooking" (claims 33, 34 and 36); and in claim 4 for "the puffed pieces" (claim 41). Claim 16 does not further limit claim 15 since the time range in claim 16 is broader than the time range in claim 15. Claim 18 is indefinite since it is not clear how the pieces are sheeted. Claims 33-35 are indefinite in not reciting what is being pumped. Corrections are required without new matter.

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

replied 5. Claims 1-41 rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-27 of U.S. Patent No.

6,291,008. Although the conflicting claims are not identical, they are not patentably

Art Unit: 1700

distinct from each other because the moisture content in step A. and the cooking temperature in step C. are each an obvious matter of choice which is not critical.

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 1-3, 5-10, ^{12-25, 27-29}~~12-27~~ and 29-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over GB patent (1,050,307).

The British patent teaches a process for producing Ready-to-Eat (RTE) cereals.

The RTE cereal is comprised of oat groats, discrete particles of bran, small portions of the original cooked berries, sugar and salt. The oat groats have a moisture content of the cooked oat groats of between about 35% and 52% (GB 1,050,307, pg. 2, lines 10-15). The ingredients are combined to form dough in an extruder including a screw. The moisture content of the grains in the extruder is between 30 and 47% (GB 1,050,307, pg. 2, lines 15-25). The dough is not entirely homogeneous and still contains visible pieces of grain. The extruded dough may be cut into pellets and rolled into flakes. After flaking, the flakes are tempered resulting in a cereal with a wholesome whole-grain origin (GB 1,050,307, pg. 2, lines 30-40). After the dough is processed, the dough can be cooked again. Further, a final hot air drying of the flakes at 300 F can be performed. Finding the optimum cooking time (claims 1 and 14), pellet size and moisture content (claim 2), SME of the dough (claims 6 and 26) and fat content

of the finished product (claim 22) would require nothing more than routine experimentation by one reasonably skilled in this art. Corn (claims 5 and 23) is a conventional and viable alternative for oats in RTE cereal flake products. Deep fat frying (claims 7 and 30) is a conventional heating procedure for preparing snack products from dough. Sugar coating of RTE cereal flakes and puffed RTE cereal products (claims 25 and 41) is also conventional.

8. Claims 4 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over the British patent as applied to claims 1-3, 5-10, 12-27 and 29-41 above, and further in view of Matz.

Matz teaches that grain pieces can be steeped before processing. Matz states that the grains are steeped by a procedure in which the grains are permitted to rest with occasional agitation (page 485). Thus, it would have been obvious to steep the grains in the British patent with intermittent agitation which enhances the steeping process, as taught by Matz.

9. Claim 28 is rejected under 35 U.S.C. 103(a) as being unpatentable over ~~the British patent~~ ^{the British patent} as applied to claims 1-3, 5-10, 12-27 and 29-41 above, and further in view of Schwab et al.

It would have been obvious to heat the cereal dough pieces in the British patent with MW heat since MW heat is a conventional alternative to other heating procedures in preparing RTE cereal pieces, as evidenced by Schwab et al.

10. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Art Unit: 1700

Hoseney (Principles of Cereal Science and Technology) teaches that the size of the grain bits is important. Hoseney teaches that the size of the grain is an important fact in the acceptance by a consumer of the product. Hoseney teaches that the particle size should be between 833um and 350um (Pg. 335).

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Arthur Corbin whose telephone number is (703) 308-3850. The examiner can normally be reached on Tuesday - Friday from 9:30 AM to 7:00 PM. The examiner can also be reached on alternate Mondays.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3602.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

Arthur Corbin/om

January 15, 2002

January 14, 2002


ARTHUR L. CORBIN
PRIMARY EXAMINER
1-16-02